THE INDIVIDUAL LIABILITY OF STOCKHOLDERS AND THE CONFLICT OF LAWS.[1]

"The realistic theory." Leaving the somewhat attenuated atmosphere of the fictions or figures belonging to the language of corporation law, let us now make an effort to get as near to the ultimate facts as legal terminology will reasonably permit. Emphasis has already been placed on the obvious proposition that a private corporation—differing from a partnership only in sundry particulars—is simply an association of *real* persons having, by virtue of either special or general laws, certain powers and disabilities, rights and "no-rights," privileges and duties, non-liabilities and liabilities that are *sui generis*.[2] This is true of *domestic* corporations. It is of course equally true of *foreign* corporations. In the last sentence the term "foreign" is useful chiefly for the purpose of showing that the original agreement of the stockholders *inter se* was made under some foreign law rather than under the domestic law.

In order to get an adequate view of the authorities relating to the obligations of stockholders in a foreign corporation, it is necessary to consider both such obligations as are created in their favor, and such obligations as are imposed upon them. More concretely, let us assume that in the *Risdon* case the bargain for the machinery took the form of a bilateral contract. The two general questions thus suggested are these: (*a*) What law determines the existence, nature and extent of the obligations that arise *in favor of* the stockholders of a foreign corporation; that is, what law determines the rights that arise in favor of the stockholders and the correlative duties that are imposed upon the other parties to the transaction? (*b*) What law determines the existence, nature, and extent of the obligations that arise *against* the stockholders of a foreign corporation; that is, what law determines the duties that arise against the stockholders and the correlative rights of the other parties to the transaction? These questions and the authorities relating thereto must be separately considered.

(*a*) What law determines the existence, nature, and extent of

[1]Part I appeared in 9 COLUMBIA LAW REVIEW 492-522, and Part II in 10 COLUMBIA LAW REVIEW 283-326. See also an introductory article entitled: Nature of Stockholders' Individual Liability for Corporation Debts, 9 COLUMBIA LAW REVIEW 285-320.

[2]See introductory article, 9 COLUMBIA LAW REVIEW 287-292.

the obligations that arise *in favor of* the stockholders of a foreign corporation? Reduced to its lowest terms, the doctrine announced in *Bank of Augusta* v. *Earle*[3] seems to come to this: Just as within the State of Georgia the stockholders of the Georgia banking corporation may do business through the activity of their representatives or quasi-agents, so they may in Alabama; and, just as the law of Georgia, as to contracts made therein, creates in favor of the stockholders merely a corporate (or quasi-joint) obligation, so, for very good reasons, the law of Alabama, as to contracts made in the latter State, creates in favor of the stockholders precisely the same sort of obligation.

Since, however, under such circumstances as those involved in *Bank of Augusta* v. *Earle, Risdon Iron etc. Works* v. *Furness*[4] and similar cases the *lex loci contractus* is to be applied, it is evident that such law, instead of creating a corporate (or quasi-joint) obligation in favor of the stockholders, may bring none at all into existence. Thus it is clear that as to all ordinary matters such, *e. g.*, as insufficiency of consideration and want of mutual assent this law is deemed controlling. But, more than that, it is equally clear that the refusal of the *lex loci contractus* to establish any obligation whatever in favor of the corporation may be based *exclusively* on the fact that the ultimate obligees—the stockholders—constitute a *foreign* corporation rather than a domestic corporation. Indeed, in a few early common law cases, American and Canadian, in substance and effect the opinion was actually expressed that, even under facts essentially similar to those of the *Earle* case, the *lex loci contractus* would create no rights whatever in favor of the stockholders of a foreign corporation.[5] While of course such a view is contrary to the *general* common law rule finally established in all jurisdictions, exceptional cases may still arise. Thus, for example, in a well-known Kansas case it was held that, where a corporation had been created under the laws of Pennsylvania with a prohibition against the transaction of any business in that State, the corporation (*i. e.*, the stockholders) could acquire no corporate or other rights from Kansas transactions.[6] Then too, at the present time most jurisdictions require that foreign corporations desiring to do business therein shall comply with

[3](1839) 13 Pet. 517, 587, 588, 589, 590.

[4][1905] 1 K. B. 304; [1906] 1 K. B. 49.

[5]For these cases see 10 COLUMBIA LAW REVIEW 302, note 35.

[6]Land Grant Ry. etc. Co. *v.* Coffey County (1870) 6 Kan. 245, 255. Compare Myatt *v.* Ponca City Land etc. Co. (1903) 14 Okla. 189.

certain conditions precedent, such as filing copies of articles of incorporation, appointing an agent for service of summons, etc.; and according to the interpretation placed on the statutes in a minority of these jurisdictions non-compliance with the prescribed conditions prevents any obligation whatever from arising in favor of the foreign corporation (*i. e.*, the stockholders thereof).[7] Since, moreover, under the more usual combination of facts now being considered, it is exclusively the *lex loci contractus* that is applicable in the first instance to determine the existence or non-existence of the obligations in question, it follows that whenever such law, by reason of non-compliance with statutory regulations, makes a corporate contract void, no obligations will be recognized as existing, even though the action "by the corporation" be brought in a judicial forum other than the place of contracting.[8]

Passing to the opposite extreme, we must now inquire whether, instead of creating corporate (or quasi-joint) rights in favor of stockholders or no rights at all, the *lex loci contractus* might confer upon them the rights of ordinary partners. As might be expected from the principles announced in *Bank of Augusta* v. *Earle* and the other cases thus far noticed, there are judicial *dicta* intimating that such a course would be within the inherent power of the place of contracting. Thus, the language of Chief Justice Beasley in *Erie Railway Co.* v. *The State of New Jersey*[9] appears entirely apposite:

"It is readily to be admitted that a law imposing certain terms upon all foreign corporations as conditions precedent to their acquisition in this state, of the right to act in the unity of their corporate existence, would be legal. * * * *A statute that should abolish the rule of comity, and should refuse a recognition of foreign corporations, would, it is conceived, have this effect and no more, i. e. to convert the foreign corporators, as to the state enacting the supposed law, into a partnership of individuals;* and thus, although the corporation, as such could not, by suit or otherwise,

[7]The cases are collected in Beale, For. Corp. (1904) sec. 214, n. 94. A few later decisions are: Pittsburg Const. Co. *v.* West Side Belt R. Co. (1907) 151 Fed. 125, 128; Colonial Trust Co. *v.* Montello Brick Works (1909) 172 Fed. 310; Tri-State Amusement Co. *v.* Forest Highlands Amusement Co. (1905) 192 Mo. 404; Altoona etc. Co. *v.* Armstrong (1909) 38 Pa. Super. Ct. 350.

In Henni *v.* Fidelity etc. Ass'n (1901) 61 Neb. 744, it was held that the corporation gained no rights even though the Nebraska contract stipulated that it should be governed by some law other than that of Nebraska.

[8]See Allen *v.* Alleghany Co. (1905) 196 U. S. 458, 465; s. c. 69 N. J. Law 270; Ford *v.* Buckeye State Ins. Co. (Ky. 1869) 6 Bush 133, 140.

[9](1864) 31 N. J. Law 531, 543.

assert its right to protect its property, the members of the company would be under no such disability."[10]

(*b*) What law determines the existence, nature and extent of the obligations that arise *against* the stockholders of a foreign corporation? Before proceeding to the authorities that directly and specifically relate to the *extent* (or limitation) of the obligations imposed on stockholders, it is important to remember that, under the facts of *Risdon Iron etc. Works* v. *Furness* and similar cases, such matters as sufficiency of mutual assent, adequacy of consideration, contravention of public policy, method of extinguishment, etc., would unquestionably be governed by the *lex loci contractus*.[11] In all these respects the obligations of stockholders stand on precisely the same footing as the obligations of ordinary foreign partners or foreign principals.

Passing now to matters of greater controversy, it is evident that questions as to the extent (or limitation) of stockholders' obligations may arise in two different ways. *First,* it may appear that the *lex loci contractus* imposes, as to a given contract, a far more extensive and onerous *corporate* (*or quasi-joint*) obligation than does the law of the place of incorporation. *Second,* the *lex loci contractus,* while not differing as to the obligation just mentioned, may afford a contrast by imposing, concurrently with the corporate (or quasi-joint) obligation, limited individual obligations such, *e. g.,* as the "proportional" individual obligations of the California law. In figurative terms, the first case above put may for convenience be called a "vertical" *enlargement* of obligation, and the second case a "horizontal" *modification* of obligation. *While as to the first case the lex loci contractus always imposes an intrinsically greater burden on the stockholders,* this is not necessarily true as to the *second.* An extension of the corporate (or quasi-joint) obligation very clearly causes a greater charge against the corporate (or quasi-joint) assets of the stockholders.[12] But, in contrast to this, the superadding of some sort of individual obligations does

[10]See also, apparently in accord, Sargent, J., in March *v.* Eastern R. Co. (1860) 40 N. H. 548.

[11]This seems to have been assumed by the judges deciding the Risdon case and also by the various commentators. See Part I, 9 COLUMBIA LAW REVIEW 494, 504, n. 26; Gibbs *v.* Société Industrielle etc. L. R. (1890) 25 Q. B. D. 399.

[12]For suggestions concerning the nature of the corporate (or quasi-joint) obligation of stockholders, see introductory article, 9 COLUMBIA LAW REVIEW 305-306.

not, in the normal case, increase the ultimate burdens to the slightest extent. That is to say, so long as the corporation is solvent, the concurrent charge on the individual assets of the respective stockholders becomes a negligible quantity. *It would thus seem evident that, all in all, the first class of cases above considered involves a greater exercise of power on the part of the lex loci contractus than does the second.*

Yet, according to high authority, extensions or limitations of obligation of the first class are to be controlled by the *lex loci contractus,—and that too, even though the corporation expressly stipulates that the contract is to be governed by the law of its place of incorporation.* Thus, for example, in *New York Life Ins. Co.* v. *Cravens,*[13] the defendant, a New York corporation, had issued a policy in Missouri upon the life of a citizen of the latter State. The policy contained an express stipulation that as to all of its provisions the New York law should be applicable, and, according to the latter, the liability of the company on the Missouri contract amounted to only $2,670. Under the obligation imposed by the "non-forfeiture" provisions of the Missouri statutes, on the other hand, the amount due on the policy was approximately $9,000. In holding the Missouri law applicable despite the express stipulation to the contrary, the United States Supreme Court, speaking by Mr. Justice McKenna, said:

"The power of a State over foreign corporations is not less than the power of a State over domestic corporations. * * * We said in *Orient Ins. Co.* v. *Daggs, supra:*

'That which a State may do with corporations of its own creation it may do with foreign corporations admitted into the State. * * * The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper* v. *California,* 155 U. S. 648, and need not be repeated.' "[14]

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[13](1900) 178 U. S. 389, 401.

[14]*Accord:* National etc. Loan Assn. *v.* Brahan (1904) 193 U. S. 635, 647, 650 (*lex loci contractus* controlling despite express stipulation); Mutual Life Ins. Co. *v.* Mullan (1908) 107 Md. 457 (same); Washington etc. Investment Assn. *v.* Stanley (1901) 38 Or. 319 (same); Owen *v.* Bankers' Life Ins. Co. (S. C. 1909) 66 S. E. 290 (same). See also Whitfield *v.* Aetna Life Ins. Co. (1907) 205 U. S. 489, 495; Burridge *v.* New York Life Ins. Co. (1908) 211 Mo. 158, 180. In the case last cited Lamm, J., said: "The defendant company had no right to do business in Missouri except by the permission of the laws of this commonwealth and under such constitutional conditions as those laws imposed. * * * By that limitation, defendant could only write insurance contracts of a certain character. * * * The defendant was not bound to come into the State of Missouri and write contracts of insurance attended with results indi-

If, under the facts of *Bank of Augusta* v. *Earle, Risdon Iron etc. Works* v. *Furness* and similar cases, the "vertical" extent of the stockholders' obligations and liabilities is to be governed by the *lex loci contractus,* shouldn't the same law, for essentially similar reasons of justice and policy, be applicable, in the first instance, to determine the "horizontal" extent?[15] Perhaps it will aid us very considerably in understanding and evaluating the various classes of authorities on this question if a certain preliminary suggestion be borne in mind: It seems well to notice that, even on the assumption that an affirmative answer be given to the above question, the more natural course, in *the absence of statutes to the contrary,* would be for the *lex loci contractus* to adopt as to the contract of a particular foreign corporation, the rule prevailing in the place of incorporation, thus imposing at least a corporate (or quasi-joint) obligation, and adding, concurrently, direct individual obligations if the latter be declared by the adopted rule. As said by Sir Richard Couch, delivering the opinion of the Privy Council in *Bateman* v. *Service:*[16]

"In the argument for the Appellant it was conceded that the general principle was, as stated by Mr. Justice *Lindley* in his work on partnership, 'that if a company is incorporated by a foreign Government so that by the constitution of that company the members are rendered wholly irresponsible, *or only to a limited extent responsible,* for the debts and engagements of the company, the liability of the members as such would be the same in this country as in the country which created the corporation.' But it was contended that the Legislature of *Western Australia* had * * * enacted that unless a foreign corporation, carrying on business in

cated by the statute under consideration. That is not the question. Defendant did come in and write insurance under the law. * * * It took its right to write insurance *cum onere*—the bitter with the sweet."

With the authorities already cited in this note, compare Arayo *v.* Currell (1830) 1 La. 528, 530, and similar cases discussed in Part I, 9 COLUMBIA LAW REVIEW 511-512; also the cases cited in Part I, 9 COLUMBIA LAW REVIEW 503, n. 25.

It is important to observe that the *lex loci contractus,* in determining the "vertical" extent of the corporate (or quasi-joint) obligation, would very probably be conceded to be applicable *pro tanto* in determining the "vertical" extent of the individual obligations (by whatever law the "horizontal" extent may be thought to be determined in the first instance). Thus, if the insurance company in the Cravens case had been a California corporation, the absolute amount of a stockholder's proportional individual obligation would vary in direct proportion to the amount of the corporate obligation; and the latter, as shown by the Cravens case as well as by the authorities cited in this note, is determined, as to its extent or limitation, by the *lex loci contractus.*

[15]Compare particularly Bank of Topeka *v.* Eaton (1899) 95 Fed. 355, discussed in Part I, 9 COLUMBIA LAW REVIEW 515.

[16](1881) L. R. 6 App. Cas. 386, 389.

Western Australia, complied with this Ordinance and was registered according to its provisions, its individual members should be liable to be sued for its debts. *It was stated, and properly, that the real question in the case was whether the Western Australian Legislature so enacted.*

"In considering that question, we may first look at the principle which is laid down by *Story.* * * * *'In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own Government,* unless they are repugnant to its policy or prejudicial to its interests.' * * *"

As an important caution suggested by the reasoning in the passage just quoted, it must be remembered that both as to the present question and as to almost all other questions in the Conflict of Laws there is frequently a serious ambiguity lurking in an undiscriminating judicial statement that a certain foreign law governs in a given case. Accordingly, in weighing many of the precedents on the present subject the vital and difficult inquiry must be this: Is the law of the place of incorporation *as such* deemed controlling in the first instance; or is the rule of that law important only because, for sufficient reasons, it is *adopted* by the *lex loci contractus,*—the latter in turn being applied by the court of the forum in which the action happens to be brought?[17] It is frequently very difficult to apply these discriminations to the cases, but some attempt to do so always tends to clarification. The real *ratio decidendi* often seems to be implicit rather than explicit.

The authorities either actually or seemingly having a somewhat specific bearing on this branch of the discussion may be conveniently considered in two classes, the division being based on the particular *point of view* from which the present problem is approached: *first,* cases involving or suggesting the question whether the law of the place of incorporation should be applicable in the first instance even as to corporation debts contracted elsewhere; *second,* cases directly involving or suggesting the question whether the *lex loci contractus* should be applicable *in the first instance* even as to debts contracted by corporations organized elsewhere.

Let us now test the primary applicability of the *lex loci contractus* to debts of foreign corporations by considering the *first* class of cases. Suppose that by the law of the place of incorporation, in addition to the ordinary corporate obligation, direct individual obligations of limited extent are imposed upon the stockholders—

[17] For further explanation of this matter, see Part I, 9 COLUMBIA LAW REVIEW 520; Part II, 10 COLUMBIA LAW REVIEW 289, n. 16.

that is, at least so far as transactions of that place are concerned. By the *lex loci contractus,* on the other hand, no direct individual obligations whatever are imposed—that is, as to *domestic* corporations. If under these circumstances any individual obligations are to be created against the stockholders of the foreign corporation, is it the foreign law that is applicable *in the first instance* to determine this result? As regards authority, the cases are of such a character that only the most cautious and qualified statements may be ventured. Despite the usual affirmative generalizations of the text-books and their citation of multitudinous cases more or less pertinent,[18] a somewhat careful search has disclosed only four actual decisions on facts showing that the corporate debt was contracted *outside of the place of incorporation.*[19] These decisions will presently be considered with some particularity. But *in the absence of space* for a more extended review, the others may be at once eliminated as of very slight weight either because of the facts actually reported or because of the want of facts. In at least one case the report shows explicitly that the place of incorporation and the place of contracting were one and the same.[20] In some of the other cases the facts actually given rather strongly suggest that the two places were identical.[21] In still others it is hardly possible to do more than guess whether the place of contracting was the same as the place of incorporation; but for obvious reasons the balance of probability, though slight, is in favor of an affirmative conclusion. It may of course be urged that even such cases as these are valuable—especially as to the more or less ambiguous *dicta* in some of them—, for the reason that the very failure of the reporter's statement and the court's opinion to indicate the place of contracting tends to show that the court assumed it to be immaterial that the place of contracting might have been different from the place of incorporation. No doubt this point has some force, but the latter is reduced to a minimum when a careful examination of the cases makes it evident that *counsel* as well as court made this

[18]The important authorities of the *first* class are those collected in Part II, 10 COLUMBIA LAW REVIEW 294, n. 24, together with Hutchins *v.* New England Coal Mining Co. (Mass. 1862) 4 All. 580, a case which could not properly be cited in the former note.

[19]Flash *v.* Conn (1883) 109 U. S. 371; Hutchins *v.* New England Coal Mining Co. (Mass. 1862) 4 All. 580; Aldrich *v.* Anchor Coal Co. (1893) 24 Or. 32, 34; Farr *v.* Briggs' Estate (1900) 72 Vt. 225 (directors' obligations under South Dakota statute; debt created in Vermont).

[20]Lanigan *v.* North (1901) 69 Ark. 62.

[21]As a typical case of this group, see Whitman *v.* Oxford Nat. Bk. (1900) 176 U. S. 559, 563.

assumption on one theory or another. More than that, on the very theory here urged as sound, this assumption was, in the last analysis, eminently proper: if, as a matter of common law, the *lex loci contractus* consistently *adopts* the rule of the place of incorporation, of course it is, in the absence of statute, immaterial where the corporate debt is created. But, whatever the explanation, the fact remains that in all of these cases both counsel and court seem to have been primarily concerned with only two questions: (1) whether the liability sought to be enforced was contractual rather than penal; (2) whether the remedy provided according to the terms of the foreign (or extra-state) statutes was so peculiar that the action to enforce the liability could not be regarded as transitory. If any "conflict of laws" was brought to the attention of the court, the contrast evidently did not relate to the law of the place of contracting in opposition to the law of the place of incorporation.

All that has been said in the preceding paragraph applies even to at least two of the four cases wherein it actually appears that the two places just contrasted were not identical, *Flash* v. *Conn*[22] and *Aldrich* v. *Anchor Coal Co.*[23]—the latter citing the former as one of its chief precedents. In the first case named the place of contracting appears only by inference and in neither case does the court attach any importance whatever to such fact. *Flash* v. *Conn,* decided by the Supreme Court of the United States in 1883, has naturally been accepted as almost unquestioned authority and has thus had by far the greatest influence in determining the trend and the language of the cases decided since that time. The defendant, a stockholder of a New York corporation, was sued in a federal court of Florida. As already stated, the corporate debt appears inferentially to have been contracted in Florida; but this fact is not definitely given either in the reporter's statement or in the court's opinion. The plaintiff having asserted the individual liability according to the terms of the New York statute, defendant's counsel, as shown by the brief reproduced in the report, resisted the action chiefly on two grounds: (1) that the New York statute prescribed some exclusive remedy which could not be given by the Florida forum; (2) that "the liability set forth in the declaration, being in the nature of a penalty imposed by a statute of New York, cannot be enforced in Florida." In holding the

[22](1883) 109 U. S. 371, 377.
[23](1893) 24 Or. 32, 34.

defendant liable, the court, speaking through Mr. Justice Woods, directed its opinion chiefly to these two points:

"We think the liability imposed by section 10 is a liability arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded. The fact that the liability ceases when these events take place does not change its nature and make that a penalty which would, without such limitation, be a liability founded on contract."

Before discussing this passage it seems well to have before us as showing the reasoning and the language in a typical case of later date, the views expressed in *Hancock Nat. Bank* v. *Ellis*,[24] a Massachusetts authority involving the Kansas statute. The place of the corporate debt cannot be ascertained either from the reporter's statement or from the court's opinion. In giving the grounds of decision, Field, *C. J.*, quoted as follows from his own opinion in an earlier case:

"The obligation imposed by the statutes of Ohio upon the stockholders for the purpose of securing the payment of the debts of the corporation is *quasi ex contractu. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders,* and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation. It is for the people of the legislature of each State to determine to what extent, if at all, the stockholders of corporations created by the laws of that State shall be liable for the debts of such corporations."

The reasoning in the passages quoted from Mr. Justice Woods and Mr. Chief Justice Field respectively, while perhaps not so analytical and explicit as it might be, undoubtedly represents a serious attempt to show that the stockholders' individual liability, *whenever it really exists as the result of such law as may be properly applicable,* is essentially quasi-contractual in its nature. But it would hardly be doing justice to the learned judges to assume that the argument contained in these and many similar judicial expressions—though obviously inadequate for the purpose—was intended to convince any one of the proposition that such liability results, *in the first instance,* exclusively from the law of the place

[24] (1896) 166 Mass. 414; (1898) 172 Mass. 39.

of incorporation even when the corporate debt is contracted elsewhere. If by any possibility intended for that purpose, such argument would seem to involve the fallacy of begging the question or reasoning in a circle. Thus, if it be urged that the stockholder "assents" or "agrees" to the liability defined in some general law of the place of incorporation, the first remark to be made is that this is often the extreme of fiction, since the stockholder really doesn't know the terms of the law in question.[25] But, more than that, even if he knows the terms of the law of the place of incorporation, it can hardly be said that there is any real assent or any specific intention to incur the liability unless we assume the real point now in issue. If, indeed, any real choice were open to him, he would, of course, intend and consent to be bound only by such law as purported to exonerate him from any individual liability. It is certainly contrary to the facts to say, *e. g.,* that a stockholder in an Ohio corporation "assents" to the liability defined by the Ohio law, *even as to debts incurred outside of that State,* unless we assume as a premise that, *nolens volens,* regardless of any genuine consent or intention on his part to become bound, his mere joining the corporation and participation in its activities and profits subjects him to the liability in question. In truth, the stockholder by initiating and continuing his relation to a corporation organized and authorized to do certain things does, by his voluntary conduct, subject himself to such obligations and liabilities as *necessarily* grow out of the relation referred to; but surely he does not "agree" or "assent" or "contract" or "intend" to be subject to any others! If, therefore, it be the fact that the law of the place of incorporation is applicable, in the first instance, only to debts incurred in that place, and if as to debts contracted in some other place the law of such other place is determinative in the first instance, doubtless any stockholder *accurately informed as to the conflict of laws,* upon becoming a member of the corporation and continuing to participate in its profits, would expect to be bound, as to the first-mentioned debts, by the law of the place of incorporation (*and contracting*), and as to the last-mentioned debts by the law of the place where they were contracted. In view of these suggestions can there be any doubt that the notions of "knowledge," "intention," "assent," and "agreement to be bound" are, in the present connection, utterly worthless fictions, impossible of application and calculated merely to

[25]See, *e. g.,* Cushing *v.* Perot (1896) 175 Pa. 66, 70, 72, 73, discussed in Part II, 10 COLUMBIA LAW REVIEW 292-293.

befog serious legal questions that in the last analysis are, despite the *language* of the judges, decided according to objective and substantial considerations of justice and policy?

There appears to be another difficulty with the supposed view that the law of the place of incorporation should control in the first instance even as to transactions occurring outside of such place. In substance it is said in many of the cases belonging to the group now before us that the individual liability "arises under the contract of subscription to the capital stock, made in becoming a shareholder;"[26] and this idea seems to pervade the passages already taken from Mr. Justice Woods and Mr. Chief Justice Field respectively. If the brief statement last quoted were entirely adequate, there might indeed be some plausibility as to the primary applicability of the law of the place of incorporation. Suppose, however, that there are in fact no creditors when the stockholder joins. How can any direct individual obligations arise at that time in favor of creditors? When the stockholder joins the corporation, who is the obligee of the obligation supposed to arise at that moment? Does the obligation run in favor of the corporation as the formal obligee, with the future creditors as the potential and anonymous third-party beneficiaries?[27] Of course this is utterly inconsistent with the real nature of the *direct* individual obligations with which we are now concerned.[28] As heretofore urged at greater length,[29] these obligations, growing out of the stockholder's participation in the activities and profits of the corporate undertaking, spring into actual existence only when the corporate debt is contracted: the corporate obligation and the individual obligations arise simultaneously. This is concisely explained by Mr. Justice Butler in *Paine* v. *Stewart*,[30] a clearly reasoned Connecticut case:

[26]Language of Knowlton, J., in Broadway Nat. Bk. *v.* Baker (1900) 176 Mass. 294, 296.

[27]Compare Kulp *v.* Fleming (1901) 65 Oh. St. 321, 338: "It was an offer to become liable on the part of the stockholders, accepted by the creditor when the credit was given, and thus became a contract, made, it is true, not directly with the creditor, rather with the corporation perhaps, but one which was for the benefit of the creditors, and to which, upon well-settled principles in this state, the creditors have the right to resort."

[28]See Pulsifer *v.* Greene (1902) 96 Me. 438, 445: "* * * It is not an asset of the corporation, adds nothing to its pecuniary resources, and is not available to or enforceable by the corporation itself. * * *"

Contrast the cases wherein the obligation runs "to the corporation" for the benefit of the creditors. These are given in Part II, 10 COLUMBIA LAW REVIEW 285, n. 8.

[29]See the authorities discussed in the introductory article, 9 COLUMBIA LAW REVIEW 285-320.

[30](1866) 33 Conn. 516, 529.

"The act of Minnesota, which authorized the organization of the bank, constituted it a corporation and gave the stockholders corporate powers, and imposed upon them corporate liabilities, but it also imposed upon them individual liability to a limited amount and in general terms. These obligations are independent and both absolute. * * *

"The liabilities then are independent and coexistent and the individual liability * * * is operative upon the stockholders while such * * * substantially as if no corporation existed legally and the debts had been contracted on their behalf as an association of individuals."[31]

From the considerations thus far presented it may well be thought that no great importance need be attached to *Flash* v. *Conn* and *Aldrich* v. *Anchor Coal Co.,* two of the four cases in which it appears either by inference or by direct statement that the corporate debt was created outside of the place of incorporation. It is more difficult, however, to dispose of a third case belonging to this small group,—*Hutchins* v. *New England Coal Mining Company.*[32] This is a notable exception for the reason that both counsel and court consciously and explicitly directed their reasoning to the very "conflict of laws" with which we are now concerned. *Prima facie,* the issue could hardly have been raised by defendants in a more favorable jurisdiction, for Massachusetts tends very strongly to adhere to the rule that the *lex loci contractus* "governs the nature, interpretation and obligation of all contracts." The statutes of this State provided for some sort of individual liability on the part of the stockholder in case of non-compliance with certain provisions. A Massachusetts corporation having contracted certain obligations in Rhode Island, the plaintiffs, citizens of the latter State, brought their action in Massachusetts. The stockholders asked the trial court to rule that their liability depended on the law of Rhode Island (evidently meaning the law of that State relating to stockholders in *Rhode Island* corporations). The upper court held that this ruling was properly refused, Bigelow, *C. J.,* rendering the opinion. The reasoning of the latter, it is respectfully submitted, is extremely difficult to follow; and it may be doubted whether all of its suggestions and implications are entirely con-

[31]Compare Finch, J., in Rogers *v.* Drucker (1892) 131 N. Y. 490, 492: "* * * in such a case the liability is not so much created by the statute as retained and preserved under the corporate form; * * * but for the latter the stockholders would have been liable as partners, and the statute continued that primary and original liability until the requisites of a corporate exemption were fully supplied."

[32](Mass. 1862) 4 All. 580.

sistent with one another. Although the opinion must be read as an entirety in order to be fairly evaluated, and although every sentence might afford the basis of interpretative comment, the limits of space make it possible to quote merely a few extracts, the latter being numbered by the writer for the purpose of subsequent convenient reference:

"(1) The rule of law that the *lex loci contractus* regulates and governs the nature, interpretation and obligation of all contracts is indisputable; but it cannot be applied in the present case to defeat the right of the plaintiffs to hold the stockholders * * * liable for the debts of the corporation. * * * (2) The suit is brought against a corporation created by a statute of this commonwealth, which, *ex proprio vigore,* had no force or validity in the state of Rhode Island. * * * (3) But the comity of states * * * extends to corporations the privilege of exercising the powers conferred by their charters beyond the limits of the state or country in which they have their origin and legitimate existence. The only restriction * * * is, that *in thus giving effect to foreign statutes,* a state is careful to see that * * * the policy of its own laws is in no way contravened or impaired. (4) It results from these familiar principles that when a corporation goes into a state other than that which created it, and enters into a contract with the citizens of that state, it exercises, not a power or authority derived from the law of the place of the contract, but it acts solely by virtue of the rights conferred by the law of the place of its creation. * * * (5) It is * * * a fallacy to say that the binding force and obligation of a contract made by a corporation in a foreign state or country depend entirely on the local laws of the place where the contract is entered into. Such a statement is only partially true. The foreign law would doubtless regulate and govern, the nature, interpretation and obligation of the contract in all respects, except so far as they depended on the extent of the powers conferred by the charter of the corporation upon the artificial person which it created. (6) These a foreign state could neither enlarge nor abridge. It could only restrict or prohibit their exercise within the limits of its jurisdiction. (7) *But in the absence of any such limitation * * * the 'comity of contract,' as it may be called, embraces and recognizes the artificial person which another state has created, with all its capacities and powers, and all the obligations and liabilities, which by the law of the place of its origin and creation constitute the essential features of its legal existence. To this extent, the lex loci contractus does not apply.* * * * (8) The laws of the state of Rhode Island, applicable to the powers and functions of its *domestic* corporations, did not in any degree operate to change the nature or extent of the liability of this corporation or of its stockholders for the corporate debts to creditors seeking to enforce them in the courts of this state. * * * "

It is believed that these quotations, whether considered independently or compared with one another, constitute striking evidence of the difficulty of maintaining the supposed proposition that the law of the place of incorporation should be the *primary* rule as *distinguished* from the *final* rule. A number of specific observations may now be ventured: (a) Extract (4) appears substantially inconsistent with extracts (2) and (3), for it is difficult to discover how the law of the place of contract can grant the *privilege of exercising* a legal power without granting the *legal power* itself. Doesn't the former presuppose the latter and must they not be derived from the same law? (b) The pivotal proposition of extract (4), being inadequate, if not misleading, should be compared with the reasoning in *Bank of Augusta* v. *Earle*[33] and other cases. (c) In evaluating extract (5), it must be remembered that the learned judge, being dominated by the "fiction theory," is doubtless referring to the contract of the *corporate entity*, as such. (d) As regards extract (6), if by any possibility the language thereof could be taken to mean that the *lex loci contractus* could not consent to admit a foreign corporation and at the same time enlarge the individual liability of its stockholders, it is noteworthy that a precisely similar line of reasoning, on being advanced by defendant's counsel in the leading case of *Pinney* v. *Nelson*, was unanimously rejected by the Supreme Court of the United States. (d) Extracts (3), (7), and (8),—particularly extract (7) —strongly *suggest* what is believed to be the true principle on which to rest the decision, viz., that, in accordance with the ideas expressed in *Bateman* v. *Service*,[34] the Rhode Island law, the *lex loci contractus*, was to be regarded as "silently" *adopting* the Massachusetts rule of individual liability, so far as *Massachusetts* corporations were concerned. In harmony with this idea, extract (8) is useful in suggesting that, as a matter of common law, the Rhode Island law, even though controlling in the first instance, doesn't *necessarily* apply to stockholders in Massachusetts corporations the same rules that it imposes on stockholders in Rhode Island corporations.[35] When, therefore, at the end of extract (7),

[33]Per Taney, C. J. (1839) 13 Pet. 517, 589: "Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied."

[34]See *ante*, pp. 525-526.

[35]Compare the passage quoted from Dicey in Part I, 9 COLUMBIA LAW REVIEW 511.

the learned judge says, "To this *extent,* the *lex loci contractus* does not apply," may not the true meaning be implicitly, if not explicitly—that because of the so-called "comity of contract" this law does not apply as the *final* rule? If so, the ambiguity of the statement would be entirely comparable to that lurking in the frequently repeated proposition that the devolution of the personal property of a decedent is governed by the law of his domicile (rather than by the law of the situs).[36] While it must be admitted that some of Chief Justice Bigelow's *dicta* seem hostile to the explanation here suggested, it is proper to remember that he was but one of six judges rendering the actual decision on the facts before them.

Whatever may be thought of this explanation as applied to the *Hutchins* case, there appears to be nothing inconsistent therewith in *Farr* v. *Brigg's Estate,*[37] the last of the four cases of the present group in which it affirmatively appears that the corporate debt was created outside of the place of incorporation. By the South Dakota statutes directors of corporations were made jointly and severaly liable, on certain contingencies, for the debts of the latter. A corporation of this State having contracted a debt in Vermont and an action against a director having been brought in the latter State, Tyler, *J.,* speaking for the Supreme Court, said:

"The question is whether the statute had any extra-territorial force—whether creditors outside the limits of that State have any remedy by virtue of its provisions. *It is well settled that penal statutes will receive no recognition* and are not enforceable in other States than the ones in which they were enacted. * * * The defendant estate claims that the statute is strictly penal. * * * The creditors * * * have a remedy by virtue of the quasi-contract which the directors entered into with them *when the sales of securities were made.* * * * The obligation which is the statute imposed on the directors not to create debts beyond a certain limit entered into the contracts of sales of securities which the directors made through their agents. *The directors created the debt in this jurisdiction,* and the statute of the sister state *fixes the extent of their liability.* * * * 'The liability arises out of the assent to the *contract creating the debt.*'"

What does the Vermont court say in substance and effect? Not that the liability is *created* by the South Dakota statute, but, on the contrary, that the "directors created the debt" in Vermont, that the

[36]See as to this, Part I, 9 COLUMBIA LAW REVIEW 520, n. 65; also the discriminating statement of Holmes, J., in Blackstone *v.* Miller (1903) 188 U. S. 189, 204.

[37](1900) 72 Vt. 225, 227, 231.

liability "arises out of the assent to the contract creating the debt," and that the South Dakota statute "will receive * * * recognition" and "fixes the extent of their liability."

Let us now change the *point of view* by considering the *second* class of cases previously outlined,—that is, the cases directly involving or suggesting the question whether the *lex loci contractus* should be applicable, *in the first instance,* even as to debts contracted by *foreign* or *extra-state* corporations. In these cases—in marked contrast to the *first* class—the ultimate question is, as a rule, squarely contested by counsel and avowedly considered by the court. It is not surprising, therefore, that the opinions of the latter are far more incisive and comparatively free from uncertainty and ambiguity.

To begin with, it is well settled, as a general common law rule, that if the law of the place of incorporation imposes no direct individual obligations whatever, the *lex loci contractus* (*even if deemed controlling in the first instance*) will *in fact* impose on the stockholders of a foreign or extra-state corporation neither partnership obligations nor any other individual obligations, but, on the contrary, merely a corporate (or quasi-joint) obligation.[38] This, as stated, represents the general rule as to what the *common law* actually does; and the reasons for such rule have already been given in the quotation from *Bateman* v. *Service.* Consistently, however, with the intimations of that case and others, and in harmony with the views here urged as sound, even the common law of a given jurisdiction may—whenever its policy seems to require such a result—depart from the general "rule of comity" and hold the stockholders to unlimited partnership obligations. This seems to be the chief, if not the only, *ratio decidendi* of a few cases.[39]

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[38]Bateman *v.* Service (1881) L. R. 6 App. Cas. 386, 389 (for facts and opinion, see Part II, 10 COLUMBIA LAW REVIEW 324-325); Second Nat. Bk. *v.* Hall (1878) 35 Oh. St. 158, 167 (for facts and opinion, see Part II, 10 COLUMBIA LAW REVIEW 323-324). Compare Newby *v.* Van Oppen (1872) L. R. 7 Q. B. 293, 294.

For similar reasons if a tort is committed by a foreign limited liability corporation, in the absence of statute the *lex loci delicti* will in general impose no individual obligations *ex delicto* upon the stockholders, but, on the contrary, only a corporate (or quasi-joint) obligation. Merrick *v.* Van Santvoord (1866) 34 N. Y. 208; Demarest *v.* Flack (1891) 128 N. Y. 205. See, to the same effect, General Steam Navigation Co. *v.* Guillou (1843) 11 M. & W. 877; Newby *v.* Van Oppen (1872) L. R. 7 Q. B. 293, 294.

[39]Cleaton *v.* Emery (1892) 49 Mo. App. 345, 353, 352, 355 (corporation chartered in Colorado, the stockholders intending to do business exclusively or almost exclusively in Missouri. Gill, J.: "The state of Colorado attempted here by this incorporation to create and send out to

In accordance with the present assumption as to the primary applicability of the *lex loci contractus,* this law may, as a result of *statutory* modification, bring about an even more extensive departure from the general rule actually adopted by the common law. The language and the reasoning of *Second National Bank* v. *Hall*[40] and *Bateman* v. *Service,*[41] already noticed at some length, give abundant support to this conclusion; and the same thing is true of two New York cases, *Merrick* v. *Van Santvoord*[42] and *Demarest* v. *Flack.*[43] The judicial views announced therein relate primarily to unlimited obligations *ex delicto* but undoubtedly apply with equal force to unlimited obligations *ex contractu.* The following extracts from Mr. Justice Porter's opinion in the first case are self-explanatory:

"The defendant Van Santvoord was not a party to the contract with the proprietors of the Camden, and he did not navigate the steamboat by which that vessel was towed. He neither owned nor chartered the Cayuga, nor did he take any part, as agent or otherwise in chartering it. He was held liable on the sole ground that he was a stockholder in the Steam Navigation Company. * * * *No law of New York has imposed such liability on the members of foreign corporations, as a condition to the exercise here of rights derived from other governments, and recognized by the rules of general comity. * * * The rules of comity are subject to local modification by the law making power; but until so modified, they have the controlling force of legal obligation.*"

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another state this organized entity, not to do business within its own realm, but to carry on such business altogether in another state. * * * To concede its validity and recognize its existence is to admit authority in another state to direct the granting of such franchises in the borders of this commonwealth; in short to yield to Colorado the partial exercise of our state's sovereignty."); Empire Mills *v.* Olston Grocery Co. (Tex. 1891) 15 S. W. 200; s. c. 15 S. W. 505, 508; compare Merrick *v.* Brainard (N. Y. 1860) 38 Barb. 574 (this case was reversed in 34 N. Y. 208, not on the ground that there was any absence of power on the part of the *lex loci delicti,* but on the ground of the rules of "comity," etc.).

See Professor E. H. Warren (1908) 21 Harv. L. Rev. 323: "Where associates are incorporated by State M, they cannot act as a corporation in State N, unless the courts of State N see fit to give validity to the incorporation. Where the courts of State N have refused to give validity to a foreign incorporation, they have held the associates to full liability on their contracts."

See also Merrick *v.* Van Santvoord (1866) 34 N. Y. 208, 210-213, 217; Demarest *v.* Flack (1891) 128 N. Y. 205, 214; and compare Bank of Augusta *v.* Earle (1839) 13 Pet. 519, 586; Hill *v.* Beach (1858) 12 N. J. Eq. 31, 35, 36, 43; Taylor *v.* Branham (1895) 35 Fla. 297; Duke *v.* Taylor (1896) 37 Fla. 64.

[40](1878) 35 Oh. St. 158, 167.

[41](1881) L. R. 6 App. Cas. 386, 388-389.

[42](1866) 34 N. Y. 208, 210-212, 217.

[43](1891) 128 N. Y. 205, 214.

It is obvious that the corporate (or quasi-joint) obligations and the proportional individual (or several) obligation imposed by the law of California as concurrent burdens, are, taken together, far less onerous as to each stockholder than the unlimited joint obligation of an ordinary partner. Accordingly, if the sovereign power of the place of contracting can legitimately modify the "rules of comity" even to the extent of imposing unlimited partnership obligations on the stockholders of foreign corporations, it seems to follow, as an *a fortiori* proposition, that the particular constitutional and legislative enactments of California are not mere *brutum fulmen.* The leading case favoring this view is *Pinney* v. *Nelson,*[44] decided in 1901 by the Supreme Court of the United States. The six defendants sued in the California courts were citizens and residents of California owning in the aggregate, 278 shares in a certain Colorado corporation,—*the total number of shares issued being 1311.* The articles of incorporation provided as follows:

"The said company is created for the purpose of carrying on part of its business beyond the limits of the State of Colorado, and the principal office of said company in the State shall be kept at the city of Denver, Arapahoe County, and the principal plant and principal operations of said company beyond the limits of the State shall be in Los Angeles County, State of California, and such other places in the State of California as may be decided upon by the board of directors. The principal business of said company in the State of Colorado shall be carried on in Arapahoe County."

The corporate indebtedness forming the basis of the action was created by contracts made, executed and to be performed in California. According to the stipulation made at the trial, "under the laws of the State of Colorado a stockholder in a corporation is not liable for any portion of the indebtedness of said corporation." In conjunction with these facts affirmatively appearing, it seems proper to emphasize that, neither in the reporter's statement nor in the court's opinion, is there any intimation that these six defendants were original incorporators,[45] that they had any actual connection with the business of the company save as ordinary stockholders, that they had any knowledge of the laws of California, or that the business of the company either was, or was intended to be, transacted exclusively in California. An action based on the Cal-

[44](1901) 183 U. S. 144.

[45]In Risdon Iron etc. Works *v.* Furness [1906] 7 K. B. 49, 58, Collins, M. R., in purporting to "distinguish" Pinney *v.* Nelson, seems to make this assumption.

ifornia statute having been brought in the courts of that State, and judgment having gone against the defendants, the case was brought by writ of error to the Supreme Court, the most important contention being that "an attempt to enforce the statutory provisions of California so far as to change the personal liability of corporators in the foreign corporation, is in conflict with the due process and equal protection clauses of the first section of the Fourteenth Amendment."

In unanimously deciding that the California statute was applicable in accordance with fundamental principles, the court, speaking by the late Mr. Justice Brewer, said:

"* * * it may be said that ordinarily it is controlled by the law of the State in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation and obligation. * * * As then a corporation can have no legal existence outside of the State in which it is incorporated, the contract of the stockholders with one another, by which the corporation is created, is presumed to have been made with reference to the laws of that State, nothing being said in the charter to the contrary. * * * Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State *they must be assumed to know the provisions of those laws.* * * * How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liabilities created by the partnership business in California? * * *

"Parties may contract with special reference to carrying on business in separate States, and when they make an express contract therefor the business transacted in each of the States will be affected by the laws of those States, and may result in a difference of liability. *Neither is it necessary to express any opinion upon the question whether the defendants could have been held liable under the California statutes, independently of the provisions of the Colorado charter.* All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, *it must be assumed* that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

In dealing with certain later cases some reference will be made to specific points in Mr. Justice Brewer's opinion. For the present it is sufficient to note that *Pinney* v. *Nelson* was followed as unquestioned persuasive authority in *Peck* v. *Noee,*[46] a California case reaching the same decision on a similar set of facts relating to a Nevada corporation.[47]

5. *The individual obligation of F, the New York stockholder, as to the debt incurred in California.*

This type case differs from case No. "4" in only one particular: In both the debt is assumed to have been contracted by the Copper King, Limited, in California; but under the facts now before us the defendant stockholder is supposed to be a New Yorker rather than a Californian. It is difficult to see how this distinction could be deemed controlling. Of course neither mere physical presence nor citizenship in a given jurisdiction is necessarily a prerequisite to the primary applicability of its law. This is shown not only by the plentiful cases relating to ordinary foreign principals and foreign partners, but also by the numerous decisions sustaining the individual liability of foreign stockholders for debts of corporations contracted within the State of incorporation.[48] In addition to this, it is clear that from the beginning to the end of Mr. Justice Brewer's opinion there is not the slightest intimation that any distinction is to be taken on the basis of residence or citizenship. On the contrary, the trend of his entire argument is against such a diversity. The differential element now in question was present in *Thomas* v. *Matthiessen,*[49] decided about a year ago by a United States District Judge of New York. The defendant, a citizen of New York and a stockholder in an Arizona corporation, was, at all times, as he alleged, without knowledge of the California statute. The corporation, having been specifically authorized by its articles to do business in California,[50] constructed a hotel and in connection therewith contracted debts in that State. The case thus appears to

[46](1908) 154 Cal. 351, 354.

[47]See also, in accord, Chesley *v.* Soo Lignite Coal Co. (N. D. 1909) 121 N. W. 73 (North Dakota statute provides for individual obligations of stockholders in foreign corporations failing to file copy of their articles, etc.; stockholders of South Dakota corporation doing business in North Dakota *held liable;* applicability of North Dakota statute taken for granted).

[48]See authorities collected and discussed in Part II, 10 COLUMBIA LAW REVIEW 294, n. 24.

[49](1909) 170 Fed. 362, 363.

[50]This fact, though not stated in the report, appears from the record of the case.

have been substantially like *Pinney* v. *Nelson.* Yet District Judge Martin, while deciding *pro forma* against the defendant in order to facilitate a speedy appeal, expressed the opinion that the latter should not be held liable:

"While a corporation is an intangible thing,—'it hath no soul, it speaketh not, it doeth not,' except through the officers who manage it—yet in the eyes of the law it is a person. *The shareholder and the corporation are different entities. The corporation transacts the business, and in most cases it is done without the knowledge of the stockholder, and may be done against his protest.* This defendant is a resident of New York. The California Constitution and Code cannot reach him without the jurisdiction of California, unless a contractual relation exists between the parties. To my mind, the only theory under which this defendant can be held liable is by construing the acts of the corporation, in doing business in the State of California, as set up in the answer, as an affirmative act on his part whereby he voluntarily became a contracting party, as no state can exercise direct jurisdiction * * * over persons or property without its territory."

In this passage we find the "fiction theory" dominant, and we are at once reminded of the opinions delivered in the *Risdon* case, the latter having been cited, of course, by defendant's counsel. As regards the point that certain *specific* business of the corporation may be transacted against a stockholder's protest, a few suggestions may be ventured. To begin with, mere dissent would clearly be insufficient to exonerate the member of either a foreign partnership[51] or a foreign corporation. Unless he goes further and absolutely severs at least his *factual* relation to his fellows by disclaiming and repudiating *ab initio* all participation in any of the anticipated business in the domestic jurisdiction and all enjoyment of its prospective profits, does he not, *as a mere question of fact* acquiesce in, adopt, and "authorize" the business to be done in his behalf, and thus become subject to the obligation of the *lex loci contractus* on the same basis as an undisclosed principal or dormant partner?[52] Moreover, when the actual decisions are considered, it may be doubted whether anything short of terminating the stockholder's *legal* relation to the corporation should suffice. Thus, as

[51]See the authorities relating to members of a foreign partnership and members of a foreign unincorporated joint-stock association, Part I, 9 COLUMBIA LAW REVIEW 513-521.

[52]As a mere matter of pleading, the statement that a given defendant held a certain number of shares etc., would seem to be a sufficient allegation that the business was being done partly in his behalf; but, if not sufficient, this difficulty could easily be cured, as to any ordinary stockholder, by alleging facts showing "authorization" in the sense above explained.

we have seen,[53] if a New Yorker buys stock in a California corporation, he becomes individually liable as to debts contracted in that State,—and that, too even though he be at all times ignorant of the California statute and, it would seem, even though by any possibility, he could show that he had *factually* done all he could to terminate his relation to the corporate business. Moreover, as already urged at length, it hardly seems possible to distinguish the latter case by arguing that, in joining the California corporation, the stockholder consents to the application of its law. When there is no knowledge, there is no real consent; when there is knowledge, it is begging the question to say *simply* that he assumes liability under the law of the place of incorporation rather than the law of the place of contracting as such.

6. *The obligation of E, the English stockholder, as to the debt incurred in California.*

With case No. "6" we reach the precise question involved in *Risdon Iron etc. Works* v. *Furness.* The only difference between the present type case and the one just discussed is this: Both defendant stockholders are non-residents and non-citizens of California, the place of contracting; but the Englishman, as distinguished from the New Yorker, happens to be a subject of the very place in which the corporation was organized. This diversity can hardly be thought of controlling importance if we remember that by the express terms of the Memorandum and Articles of the Copper King, Limited, that company was organized for the purpose of engaging in mining enterprises "in the *United States,* Australia and elsewhere." As will be remembered, however, the English Court of Appeal decided against the applicability of the California law to the English stockholder. In the Court of Appeal, Collins, *M. R.,* gave his reasons in part as follows:[54]

"On the facts of this case it cannot be and ought not to be inferred that the defendant authorized the company to pledge his credit in the manner suggested, and unless such an authority is found as a fact and can properly be inferred from the agreed facts no liability can arise. I agree with Kennedy, J., who has pointed out in his judgment that, though there are general provisions as to the company carrying on business in foreign countries, there is always the underlying and essential fact of its incorporation as an English company. * * * Prima facie the provisions of the

[53]See Part II, 10 COLUMBIA LAW REVIEW 294, and authorities collected in note 24; also authorities relating to the "vertical" extent of the stockholders' obligations, *ante,* pp. 523-525, and note 14.

[54][1906] 1 K. B. 49, 56, 58.

memorandum of association must be taken to give power to do things not inconsistent with the constitution of the company under the memorandum and articles of association, but it cannot be assumed that because there is liberty to trade in a foreign country, the company is released from the fundamental condition which limits the liability of its members. To arrive at any other conclusion there must be something more than the fact that the company, which is a limited company, is authorized by its memorandum of association to do certain things. * * * It was also said that there were decisions in the Courts of the United States * * * and the case relied on was *Pinney* v. *Nelson*. When that case is examined it appears to be distinguishable from the present one upon the grounds stated by Kennedy, J., in his judgment. By the constitution of the company in that case there were provisions out of which the Court inferred that there was an express agreement, to which all the shareholders must be taken to be parties, that the business of the company should be conducted in a named and foreign state. The inference of fact was that every person who could be said to be a party to the initiation and incorporation of that company must be taken to have authorized the company to trade in California, that being the special object with which the company was incorporated. That was the inference of fact that was drawn. It is not for us to canvass whether it was rightly drawn or not in that case. In the case before us there is a complete absence of the materials on which the inference was drawn in that case."

In the course of a very brief opinion, Mathew, *L. J.*, said:

"*The plaintiffs in this case fail to shew even knowledge on the part of the defendant* of the existence in California, where the work of the company was being carried on, of a law having that effect [*i. e.*, as to individual liability], and they are unable to show any request or assent by the defendant."

A number of important questions are suggested by the somewhat ambiguous language of the foregoing passages:

(a) Do the learned judges mean that, because of the clause in the memorandum of association relating to limited liability, the stockholders had, as a mere matter of *fact,* impliedly negatived the authority of the company (*i. e.*, its representatives) to trade in California? If this had been true, the transaction in California would have been *ultra vires,* and there would doubtless have been greater plausibility to the contention that the stockholders should not be held to any individual liability, however true it might be that they would have at least a corporate (or quasi-joint) obligation to return the equivalent of benefits received under the *ultra vires* bargain. Probably, however, (even despite the language used in "distinguishing" *Pinney* v. *Nelson*) Collins, *M. R.*, doesn't mean

to take this position; and certainly it plainly appears untenable.[55] The stockholders may not have affirmatively and specifically intended to incur any individual legal liability, and they may even have labored under an actual, though mistaken belief, that the laws of the United States were exactly like those of England; but clearly neither of these considerations negatives the fact that by joining the association and continuing their relation thereto either by active participation or by acquiescence and adoption the stockholders did, in the generic and sufficient sense of the term, "authorize" the California business to be done.

(b) Do the learned judges mean that, in addition to authorizing the California business, the stockholder must have a *specific* intention to incur the individual *legal obligation* as such? In the last analysis this seems to be the basic proposition of both the lower court and the upper court. Yet in cases not involving the conflict of laws nothing is clearer than the rule that undisclosed principals, dormant partners and shareholders in unincorporated joint-stock associations become legally bound in spite of an exactly opposite specific intention.[56]. How then can such specific intention be material when the conflict of laws is involved? Of course—though the judges themselves don't say so—it might be suggested that, according to the *nominal* "intention" theory of the English courts as to the law governing contractual obligations, the supposed specific intention of the parties might *prima facie* be of some importance; but in relation to the debt contracted by the Copper King, Limited, in California it could hardly be questioned—even on the English precedents—that as to all matters relating to the *corporate* (*or quasi-joint*) obligation (including the *"vertical extent or limitation"* thereof) the California law would be "the law which they intended or *rather by which they may justly be presumed to have bound themselves."* Why should any different intention "be presumed" as to the *individual* obligations? It is certainly plausible that inwardly the English stockholders didn't intend to be bound by any law that could impose such obligations; but what of the California creditor, who according to the balance of

[55]On this point it is sufficient to refer to Greenwood's Case (1854) 3 De G. M. & G. 459, 475.

[56]See especially Beckham *v.* Drake (1841) 9 M. & W. 79; Greenwood's Case (1854) 3 De G. M. & G. 459, 475-477; also authorities cited *post*, p. 546, n. 59.

probability knew of the California law and therefore relied on it?[57] As we have seen, knowledge and intention as tests to determine the law applicable to stockholders' obligations are generally fictions; and in the last analysis objective considerations as to what is just and expedient must be resorted to. Thus it is that in *Pinney* v. *Nelson,* Mr. Justice Brewer, though purporting to proceed according to the *nominal* intention theory, in reality adopts an objective test. Does any one seriously suppose that the nine justices of the Supreme Court thought, "as an inference of *fact*" (to use the language of Collins, *M. R.*), that the stockholders in *Pinney* v. *Nelson* specifically consented or intended to be bound by the California law in respect to the matter of individual liability? Of course exactly the opposite inference was suggested *prima facie* by the facts of the case, as Lord Collins himself more or less suggests. The two most important statements in Mr. Justice Brewer's opinion are these: "* * * When a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it *must be assumed* that the charter contract was made with reference to its laws." "Contracting with reference to the laws of that State they MUST *be assumed* to know the provisions of those laws." It seems obvious that the court here intends to announce a so-called "conclusive presumption," which, reduced to lowest terms, is of course a conclusive rule of *substantive* law,[58] viz.: that under facts such as those of *Pinney* v. *Nelson* the stockholders' obligation will be measured by California law *whether or not* the charter contract was mentally made "with reference" thereto, and whether or not the stockholders had knowledge thereof.

(c) Does it make any difference that the English stockholders had no knowledge of the California law and thus authorized the California business under an actual, though mistaken, belief that this law was the same as that of England? Such a notion seems to be more or less specifically suggested by Lord Justice Mathew's statement as to want of knowledge. Perhaps this matter has been sufficiently considered in the preceding paragraph; but, by way

[57]Compare Prof. J. H. Beale (1909) 23 Harv. L. Rev. 80, n. 1. It must be remembered that by actual agreement between the California creditor and the corporate representative of the Copper King, Limited, the stockholders might have negatived any individual obligations and thus subject themselves exclusively to a corporate (or quasi-joint) obligation. See introductory article, 9 COLUMBIA LAW REVIEW 308-309.

[58]See 4 Wigm. Ev. sec. 2492.

of practical analogy, one further suggestion may be made: If the *lex loci contractus* imposes only a *limited* individual obligation on a stockholder in a foreign corporation despite his specific expectation and intention to the contrary, he is at least somewhat better off than when, *because of the unconstitutionality of the incorporating statute*[59] or because of insufficient compliance with the provisions of a valid statute,[60] he becomes unexpectedly bound to *unlimited* partnership obligations as to transactions taking place in the very State where the law was supposed to annex only a corporate (or quasi-joint) obligation.

(d) Is it a material distinction that in *Pinney* v. *Nelson* the articles of incorporation provided *specifically* for doing business in California as well as in Colorado and other places, whereas in the *Risdon* case, on the other hand, the express provision was for engaging in mining enterprises "in the United States of America, Australia and elsewhere." That a negative conclusion should be reached seems reasonably clear: authority actually given is just as real even though conveyed in generic rather than in specific terms. As to that it seems well to consider, merely by way of comparison, the reasoning of Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Co.*,[61] a case before the English Court of Appeal:

"* * * the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. * * * If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out

[59]Eaton *v.* Walker (1889) 76 Mich. 579, 590, per Long, J.: "The fact that they took counsel and acted in good faith in organizing under what they were advised was a valid law does not relieve them of their liability. It is well settled that obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts." See also Michigan *v.* How (1850) 1 Mich. 512; Clark *v.* American etc. Co. (1905) 165 Ind. 213, 216.

[60]The authorities relating to stockholders in defectively organized corporations not amounting to *de facto* corporations are collected by Prof E. H. Warren (1908) 21 Harv. L. Rev. 321: "Viewing the authorities as a whole * * * they establish the proposition that the associates may be held to full liability on a contract, notwithstanding that they intended to contract only as a corporation and therefore to subject themselves only to a limited liability."

[61][1891] 1 Q. B. 79, 82, 83, 84.

in that country was to be carried out according to the law of that country."

For similar reasons, even though there be no *express* provisions for doing business outside of the place of incorporation,[62] it may well be thought that the *lex loci contractus* should determine the individual obligations of the stockholders, at least whenever all the circumstances are such that that law is determinative as to the corporate or quasi-joint obligation. As said by Mr. Morawetz:[63]

"It is implied in the charter or articles of association of every corporation in the absence of an express provision to the contrary, that the business of the company may be carried on in the usual way and manner, and by the usual agencies, abroad as well as at home. The shareholders of the company must be held to have impliedly agreed to this, and to have invested the company's agents with the necessary authority."

II. ASSUMING THAT THE CALIFORNIA LAW IS PROPERLY APPLICABLE IN THE FIRST INSTANCE SO AS TO IMPOSE ON THE ENGLISH STOCKHOLDER AN INDIVIDUAL PRIMARY OBLIGATION, SHOULD THE CALIFORNIA CREDITOR, IN CASE OF BREACH, BE ABLE TO MAINTAIN AN ACTION IN THE ENGLISH COURTS FOR THE PURPOSE OF ENFORCING THE SHAREHOLDER'S "PROPORTIONAL INDIVIDUAL LIABILITY"?[64]

[62]It may be that Leyner Engineering Works *v.* Kempner (1908) 163 Fed. 605, was a case where there was no express provision for doing business outside of the place of incorporation,—the report being silent on this point. A Colorado statute provided for a joint and several individual liability as to stockholders in foreign corporations failing to file a copy of their articles of incorporation, etc. A Texas corporation having done business in Colorado and having contracted a debt there, a Texas stockholder was sued in the federal court of Texas. District Judge Burns held that the action could not be maintained. His opinion, relying entirely on text-books, seems to afford ample evidence that the learned judge was not aware of Pinney *v.* Nelson. Thus he says: "The doctrine is monstrous and finds no support in the decisions of any court, state or federal * * *."

See, essentially *contra* to the foregoing case, Chesley *v.* Soo Lignite Coal Co. (N. D. 1909) 121 N. W. 73 (North Dakota statute similar to that of Colorado; stockholder whose citizenship does not appear held liable *in North Dakota courts;* applicability of North Dakota statute seems to have been conceded or taken for granted).

With the foregoing authorities, compare Anthony *v.* Metropolitan Art Co. (1906) 190 Mass. 35, 38; Standard Asphalt Co. *v.* Merrimack Pav. Co. (1907) 195 Mass. 461, 464 (expressly leaving present question open and undecided).

Compare also cases holding directors in foreign corporations liable under the *lex loci contractus* for debts of the corporation because of non-compliance with certain conditions. Nelson *v.* Bank of Fergus Co. (1907) 157 Fed. 161, 167 (citing Pinney *v.* Nelson), Staten Island etc. R. Co. *v.* Hinchliffe (1902) 170 N. Y. 473 (applicability of statute seems to have been assumed); but compare, *contra* to the foregoing as to *non-resident* directors in foreign corporations, Richmond etc. Co. *v.* Dininny (Va. 1906) 53 S. E. 961, 962.

[63]Priv. Corps. (2nd ed. 1886) sec. 958.

[64]As to the nature of this question, see Part I, 9 COLUMBIA LAW REVIEW 495-498.

While not one of the English judges clearly differentiates this question from the main point in the case, it is at least strongly suggested by passages in the opinions of Mr. Justice Kennedy of the lower court and Lord Justice Romer of the Court of Appeal. Thus the latter says:[65]

"I need hardly point out that the shareholder and the company are different entities. * * * If the shareholder and the company are treated as different entities the plaintiffs cannot by law *enforceable in this country* say that the company, trading in California, must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable."

It is elementary, according to common law principles, that in general an action to enforce a liability *ex contractu* or *quasi ex contractu* is transitory;[66] that is, an action may be brought in the courts of any State or country that can acquire the necessary jurisdiction over the person or the property of the defendant. It is equally well established as an exception that such an action, when based upon a primarily applicable law other than that of the forum, will not be entertained if the proceeding would be inconsistent with the public policy of the forum or would be shocking to its ideas of justice or good morals.[67]

It seems reasonably clear that the present case does not fall within the exception. The individual obligations of stockholders considered in this article are contractual or, perhaps more strictly, quasi-contractual;[68] and there is hardly any greater reason[69] for refusing to consider an action based thereon transitory than there would be for denying a remedy on an obligation incurred by an ordinary foreign principal or foreign partner. Thus says Mr. Justice Gantt in *Guerney* v. *Moore:*[70]

"It does not follow that because the people of this commonwealth have restricted the liability of stockholders created by virtue of our laws to the amount of their stock, they will refuse to enforce in their courts the contracts of its own citizens who voluntarily

[65][1906] 1 K. B. 49, 59.

[66]See the authorities collected in Part II, 10 COLUMBIA LAW REVIEW 294, n. 24.

[67]Hope *v.* Hope (1857) 8 De G. M. & G. 731; Kaufman *v.* Gerson [1904] 1 K. B. 591.

[68]See introductory article, 9 COLUMBIA LAW REVIEW 309-320.

[69]Nothing but a supposed commercial inexpediency or supposed "monstrous" hardship on the stockholders could be the basis of a denial of relief. For this line of argument, see Leyner Engineering Works *v.* Kempner (1908) 163 Fed. 605 (referred to *ante,* p. 546, n. 60).

[70](1895) 131 Mo. 650.

go into other states, and become stockholders in corporations under their laws, which imposes upon stockholders a personal liability in excess of the amount of the stockholder. Such a contract is not against public policy. It contravenes no principles of good morals and has no mischievous tendency. It is not in any sense repugnant to our ideas of justice or honesty."

As stated at the beginning of this article, while the writer is inclined to doubt the correctness of the result reached in the *Risdon* case, his main purpose does not require that any very positive conclusion be reached on that point. On the contrary, his aim has been to make plain the issues, to emphasize relevant analogies, to suggest possible conclusions and to bring together the various classes of authorities believed to be more or less in point.

WESLEY NEWCOMB HOHFELD.

LELAND STANFORD JR. UNIVERSITY.